

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ALBERTSON'S, INC.

Employer

and

Case 36-RC-5958

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 555, AFL-CIO,
CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All meat cutters, meat wrappers, and butcher block department employees employed by the Employer at its 113 North Ross Lane, Medford, Oregon, facility;

Excluded: All guards and supervisors as defined by the Act, and all other employees.

The Employer is engaged in retail grocery and drug sales at numerous locations in several states, including the facility involved herein, located in Medford, Oregon. At hearing, the parties stipulated to

the appropriate unit as set forth above. The sole issue in the hearing is the supervisory status of meat manager Larry Westwood, in that the Employer contends that Westwood is a statutory supervisor, while Petitioner contends that he is not.

The store opened on October 20, 1999, and is under the overall supervision of store director Don Kennedy. Directly under Kennedy is assistant store director Brian Winters, who is also the grocery manager. Departments within the store include grocery, front-end, service deli, produce, bakery, meat, pharmacy, general merchandise, and lobby. Each such department has a “manager.” There are about 92 employees in the store. Kennedy has final authority to hire, fire, and discipline employees. Winters has such authority in Kennedy’s absence.

There are about seven employees in the meat department, including Westwood. Westwood is the meat cutter on the first shift five days a week. As do other department managers, Westwood normally works 44 hours per week, the extra four hours being time for him to perform his scheduling and record-keeping duties. Westwood’s primary responsibility is merchandising the meat, and he is eligible for a bonus based on his department’s sales. There is a meat merchandiser in the Portland divisional office, Chris Hyatt, who has unspecified supervisory authority over Westwood. The division office provides a schematic of how to display meat. Westwood can adapt the schematic to his store’s particular needs, and discusses such adaptations with Kennedy before implementing them. Any major changes are discussed in advance with Hyatt.

The hours of work of the employees are based on the projected sales for a week. Labor costs are expected to meet a certain percentage of sales. Westwood calculates how many hours to schedule for the week, based on the sales projections given to him by Kennedy. In scheduling employees, Westwood tries to honor requests for certain days off. The employees perform the same work day after day and require little direction from Westwood to perform their jobs. When Westwood leaves for the day, he leaves a “cutting list” for the meat cutter on the evening shift.

Two employees have been hired during Westwood’s tenure as meat manager. Dean Nehf was a butcher block employee when a meat cutter position opened up. Westwood told Kennedy that Nehf had past experience as a meat cutter and that he wanted to give him the job. Kennedy posted the job according to the Employer’s normal procedures, and Nehf formally applied for it. Nehf was interviewed by Westwood and Brian Winters together. Winters made the decision to hire Nehf as meat cutter and set his wage amount.¹ Mark Webb was hired to fill an opening in the butcher block area. He was the only applicant. Westwood interviewed Webb, then introduced him to Kennedy, as a prospective applicant.² Kennedy interviewed Webb briefly and then told Westwood he had no problem with hiring Webb. In this regard, I note that Kennedy, at a minimum, did not leave the decision to Westwood without Kennedy’s own “pass” on the candidate. Moreover, given that Nehf, then a store employee already, had to go through a full posting/interview with Winters to be promoted, it would not appear that the interview of a totally new employee - seemingly an action requiring more judgment - would be merely perfunctory.

One employee has been disciplined during Westwood’s tenure. Westwood talked to Kennedy about problems he was having with meat cutter Brent Curtis, who worked on the evening shift. Curtis was not completing the work assignments left for him each day by Westwood. Westwood recommended that Curtis be fired. Curtis was also violating the store’s dress code. On both subjects, Kennedy told

¹ Presumably based upon his own role in the interview. I.e., there is no hint he simply relied on Westwood’s earlier stated wishes, and was not “tuned into” the interview.

² The record does not reflect a recommendation by Westwood.

Westwood to talk to Curtis, advising Westwood as to the approach to take in the conversation, including telling Westwood to tell Curtis that if he violated the dress code again, Westwood would send him home. Westwood had two separate conversations with Curtis, one about the dress code, the other about his work performance. In the conversation about work performance, no threats of disciplinary action were made. Curtis was not fired as Westwood had recommended, but later quit.

Westwood is paid hourly at \$15.51 per hour, while the next highest-paid employee in the meat department, the meat cutter, is paid \$15.16 per hour. Westwood receives the same benefits as all other employees. He punches the time clock and is not permitted to work "off the clock." Westwood attends a weekly meeting of department managers with Kennedy wherein merchandising and cost matters are discussed.

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Westwood does not have independent authority to hire, transfer, or promote, nor does he have authority to effectively recommend such actions.³ It is clear that the store director and assistant store director have authority to hire, and that they conduct an independent investigation before following any recommendation from Westwood. In the case of Nehf, a full posting and interview was required, notwithstanding Westwood's recommendation. Assistant store director Winters interviewed Nehf along with Westwood, even though Nehf was already an employee in the store. Store director Kennedy interviewed Webb, although perhaps in a perfunctory manner. I note that Webb was the only candidate for the position and that it was necessary for a "pass."

Westwood does not have authority to fire or to discipline. He recommended that Brent Curtis be fired because he was not completing his work assignments, but Curtis was not fired or even disciplined beyond a verbal reprimand delivered by Westwood. Westwood twice delivered verbal reprimands to Curtis, but only after discussing Curtis' infractions with store director Kennedy and receiving specific instructions from Kennedy regarding giving the reprimands. There is no evidence that any record of such verbal reprimands was preserved in Curtis' personnel file, but in any event, the decision on what action Westwood took, or was to take in the future, was Kennedy's.

Westwood schedules employees and gives them some direction in their work, but the record reflects that such activities on his part are merely routine matters not requiring any independent judgment. The other cutter is experienced, and merely is told the cuts that are needed. The hours of work are mechanically calculated based upon sales projections for the week given to him by the store director. The employees perform the same work every day.

Therefore, based on the record evidence, I conclude that Westwood is not a supervisor within the meaning of the Act.⁴

³ Authority to effectively recommend "generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation is ultimately followed." *ITT Lighting Services*, 265 NLRB 1480 (1982).

⁴ As always, the burden is on the party asserting supervisory status to prove the same.

There are approximately 7 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 555, AFL-CIO, CLC.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Officer-in-Charge who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Portland Subregional Office, Koin Center, Room 401, 222 S.W. Columbia Street, Portland, Oregon 97201-5878, on or before January 10, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive

Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 18, 1999.

DATED at Seattle, Washington, this 3rd day of January, 2000.

/s/ PAUL EGGERT

Paul Eggert, Regional Director
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